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October 5, 2011

Ms. Jocelyn Boyd
Chief Clerk and Administrator
South Carolina Public Service Commission
Synergy Business Park, The Saluda Building
101 Executive Center Drive
Columbia, South Carolina 29210

Re: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, Home Telephone Company, Inc., and PBT Telecom, Inc.
Docket Nos. 2011-243 through 246-C

Dear Ms. Boyd:

Enclosed please find a Proposed Order filed on behalf of Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, Home Telephone Company, Inc. and PBT Telecom, Inc. in the above-referenced dockets.

Please let me know if you have any questions.

Sincerely,

M. John Bowen, Jr.

MJB,Jr./rwm
Enclosure

cc: Interested Parties

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BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

Docket Nos. 2011-243-C, 2011-244-C, 2011-245-C, and 2011-246-C

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Farmers Telephone Cooperative, Inc. (Docket No. 2011-243-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Fort Mill Telephone Company (Docket No. 2011-244-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Home Telephone Company, Inc. (Docket No. 2011-245-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and PBT Telecom, Inc. (Docket No. 2011-246-C)

PROPOSED ORDER OF FARMERS TELEPHONE COOPERATIVE, INC., FORT MILL TELEPHONE COMPANY D/B/A COMPORIUM COMMUNICATIONS, HOME TELEPHONE COMPANY, INC., AND PBT TELECOM, INC.

I. PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petitions for Arbitration of Time Warner Cable Information Services South Carolina), LLC, doing business as Time Warner Cable ("Time Warner"), filed on June 13, 2011 (the "Initial Petitions") and revised on August 16, 2011 (the "Revised Petition"), for arbitration concerning Time Warner's request to adopt the interconnection agreements between Sprint Communications, L.P. ("Sprint") and four rural local exchange carriers operating in South Carolina (the "RLECs"). The Time Warner Petitions are substantively the same for each of the RLECs, and will be referred to collectively herein, as amended by the Revised Petition, as the "Petition," except where it is necessary to distinguish between the Initial Petitions and the Revised Petition.

Time Warner proposes to adopt the Sprint interconnection agreements with each of the respective RLECs: Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company d/b/a Comporium Communications, Home Telephone Company, Inc., and PBT Telecom, Inc.[1] The interconnection agreements between Sprint and the respective RLECs are generally identical except for certain company-specific information (*e.g.*, names, addresses, point of interconnection designations, etc.), and will be referred to collectively herein as the "Sprint ICA."

[1] The respective Sprint ICAs are attached as Exhibit 1 to the Initial Petitions filed by Time Warner in these dockets.

On or around January 20, 2011 Time Warner sent to each of the RLECs by overnight mail a letter request to adopt the Sprint ICA.[2] RLECs responded that it was their understanding that Time Warner was not a "telecommunications carrier" as defined in the federal Telecommunications Act[3] and, therefore, that Time Warner was not eligible to adopt the Sprint ICA pursuant to Section 252(i) of the Act.[4]

Time Warner filed its Petition on June 13, 2011, arguing that, pursuant to Section 252(i) of the Act, the RLECs are required to allow Time Warner to adopt the Sprint ICAs.[5] Time Warner stated that the only limitation the Commission placed on Time Warner's ability to interconnect with the RLECs is that the interconnecting carrier must be certificated and regulated by the Commission.[6] Time Warner also argued it is independently entitled to adopt the Sprint ICAs based on Time Warner's ability to offer wholesale telecommunications services.[7]

RLECs responded to the Initial Petition (the "Initial Response"), stating that the issue for decision is whether Time Warner is entitled to adopt the Sprint ICAs.[8] According to RLECs, that issue turns on the question of whether or not Time Warner is entitled to request interconnection directly with RLECs, an issue which the Commission previously expressly declined to address in Docket Nos. 2008-325-C through 2008-329-C.[9] That question, in turn, depends on whether or not Time Warner is considered a "telecommunications carrier" under federal law, for purposes of triggering RLECs' obligation to provide interconnection under Section 251 of the Act.[10]

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[2] *See* Letters to RLECs from Maribeth Bailey dated January 20, 2011 (attached to Initial Petitions as Exhibit 2).
[3] *See* Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Act").
[4] *See* Letter dated February 17, 2011, from Lans Chase to Maribeth Bailey (attached to Initial Petitions as Exhibit 3).
[5] Initial Petitions at ¶¶ 15, 17.
[6] *Id.*, ¶ 17.
[7] *Id.*, ¶ 18.
[8] Initial Response, p. 2.
[9] *Id.*
[10] *Id.* at pp. 2-3.

On August 16, 2011, Time Warner moved to "clarify" its Initial Petitions by filing a Revised Petition. While RLECs did not agree with the basis for Time Warner's Motion, RLECs did not oppose the Motion, provided that RLECs were afforded an adequate opportunity to respond to the Revised Petition.[11] To help expedite matters, RLECs filed their response to Time Warner's Revised Petition concurrently with RLECs' response to Time Warner's Motion (the "Response to Revised Petition"). By Directive dated August 24, 2011, Hearing Officer B. Randall Dong granted Time Warner's Motion and accepted the revised filings of the parties as filed.

In the Revised Petition, Time Warner asserts that the main issue for arbitration is whether Time Warner is entitled to interconnect with the RLECs under Section 251 of the Act.[12] Time Warner claims that it is entitled to direct interconnection with the RLECs and that the RLECs' refusal to allow Time Warner to adopt the Sprint ICA is factually and legally baseless.[13] Time Warner claims that an issue raised by RLECs – i.e., whether Time Warner may adopt an interconnection agreement whose initial term has expired -- is not the "real issue in dispute" between the parties.[14]

RLECs responded to the Revised Petition by again stating that the primary issue for decision is whether Time Warner is entitled to adopt the Sprint ICAs, which turns on whether or not Time Warner is entitled to request direct interconnection with the RLECs.[15] RLECs claim that Time Warner is not a "telecommunications carrier" under federal law, because its Digital Phone Service is an "interconnected VoIP" service, which has not been classified under federal

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[11] See RLECs' Response to Motion to Clarify the Petitions for Arbitration, dated August 19, 2011.
[12] Revised Petition at 9.
[13] *Id.* at 8.
[14] *Id.* at 7.
[15] Response to Revised Petition at 2.

law as either a telecommunications or an information service.[16] Nor does the provision of other services entitle Time Warner to interconnection, according to RLECs. Time Warner has stated it intends to provide unspecified "wholesale telecommunications services" that apparently consist of obtaining interconnection from the RLECs and "providing" that interconnection to itself and possibly to other carriers in the future. RLECs contend that this does not constitute the provision of telecommunications service.[17] Time Warner also provides point-to-point transmission services. According to RLECs, these services by definition would flow from one point to another and not through the interconnection with RLECs and, therefore, cannot serve as the basis for an interconnection request.[18]

A hearing on this Arbitration was held on August 29, 2011, with the Honorable John E. "Butch" Howard, Chairman, presiding. At the hearing, Time Warner was represented by Frank R. Ellerbe, III, and Bonnie D. Shealy. Time Warner presented the Direct and Rebuttal testimony of Julie P. Laine. Because of weather conditions that affected travel plans, Ms. Laine appeared by videoconference. Likewise, due to weather conditions, Ms. Maribeth Bailey was unable to attend the hearing in person or by videoconference, and Ms. Laine adopted Ms. Bailey's prefiled Direct Testimony, without objection by the parties.

The RLECs were represented at the hearing by M. John Bowen, Jr., and Margaret M. Fox. The RLECs presented the Direct and Surrebuttal Testimony of Douglas Duncan Meredith.

The Office of Regulatory Staff ("ORS") was represented at the hearing by Jeffrey M. Nelson. ORS presented the testimony of Dawn M. Hipp.

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[16] *Id.* at 4.
[17] *Id.*
[18] *Id.*

II. ARBITRATION PROCEDURE

From the start, it should be noted that this is not a typical arbitration under Section 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act").[19] While Time Warner purports to have filed the Petition in accordance with the Act, RLECs take the position that Time Warner is not acting as a "telecommunications carrier" in this matter and, therefore, neither the requirements of the Act nor the timeframes set forth in the Act apply to this matter. As further explained herein, we agree with the RLECs' position that Time Warner is not entitled to direct interconnection under Section 251 of the Act and that, therefore, the provisions of Sections 251 and 252 of the Act, including the statutory timeframes included therein, are not mandatory or binding on the Commission in this instance. However, we note that we are using those timeframes as general guidelines in resolving the issues before us. We therefore provide information on the provisions and timeframes of the Act for reference and guidance purposes.

After a telecommunications carrier has made a request for interconnection with another telecommunications carrier, and negotiations have continued for a specified period, the Act allows either party to petition a state commission for arbitration of unresolved issues. 47 U.S.C. § 252(b)(1). The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved, and must include all relevant documentation, including the position of each of the parties with respect to the unresolved issues. 47 U.S.C. §§ 252(b)(2)(A). A non-petitioning party to a negotiation under this section may respond to the other party's petition and may provide such additional information as it wishes within twenty-five (25) days after the state commission receives the petition. 47 U.S.C. § 252(b)(3). The Act

[19] 47 U.S.C. §§ 252(b)(1) and (2).

limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response. 47 U.S.C. § 252(b)(4).

In this case, we will refer to the pleadings filed by the parties, including the Initial Petitions and Responses, and the Revised Petition and Response to Revised Petition, to frame the issues before us.

III. HISTORY

In 2003, Time Warner received a Certificate of Public Convenience and Necessity to provide facilities-based Voice-over Internet Protocol ("VoIP") services throughout the State of South Carolina, except in areas where incumbent rural local exchange carriers held rural exemptions pursuant to 47 U.S.C. § 251(f)(1).[20]

In 2004, Time Warner sought to expand its authority to provide VoIP service in those areas served by Farmers, Fort Mill, Home, PBT, and St. Stephen Telephone Company ("St. Stephen"). We denied Time Warner's application because there was "a major discrepancy between the Application, the prefiled testimony, and the testimony presented at the hearing," and it was unclear exactly what services Time Warner was seeking authority to provide.[21] We were particularly concerned that Time Warner did not appear to be seeking authority to provide service but appeared "to be seeking only authority to enter into negotiations toward interconnection agreements with the RLECs."[22] Specifically, it appeared that Time Warner was "interested in receiving certification as a telecommunications carrier as a vehicle for obtaining network interconnection and other services from incumbent local exchange carriers like the RLECs."[23] Time Warner appealed the Commission's orders, and the Supreme Court of South

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[20] *See* Order No. 2004-213 in Docket No. 2003-362-C.
[21] *See* Order No. 2005-484 at p. 2; *see also* Order No. 2005-412, both issued in Docket No. 2004-280-C.
[22] Order No. 2005-484 at 3.
[23] Order No. 2005-484 at 3.

Carolina affirmed the Commission's denial of a certificate to Time Warner.[24]

In 2007, the Federal Communications Commission ("FCC") addressed a petition in which Time Warner Cable asked the FCC to declare that wholesale telecommunications carriers like Sprint are entitled to interconnect and exchange traffic with incumbent local exchange carriers when providing services to other service providers, including VoIP service providers like Time Warner.[25] The FCC granted the petition, finding that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with ILECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.[26] The FCC placed several conditions on these interconnection rights, including a condition that the wholesale telecommunications carrier must assume responsibility for compensating the incumbent LEC for the termination of all traffic exchanged under the interconnection arrangement.[27] Subsequently, in 2007-2008, Sprint requested and obtained interconnection with RLECs. The Sprint ICAs included language allowing Sprint, as a wholesale telecommunications carrier, to exchange third party interconnected VoIP traffic with RLECs, pursuant to the authority and conditions in the *Time Warner Declaratory Ruling*.

In August 2008, Time Warner again filed applications for certification to serve certain RLEC areas, including Farmers, Fort Mill, Home and PBT.[28] Time Warner sought authority to provide Voice Over Internet Protocol ("VoIP") telephone services to residential and business customers using its own privately managed IP network and the public switched telephone

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[24] *See Time Warner Cable Information Services (South Carolina), LLC v. Public Service Comm'n of South Carolina*, 377 S.C. 368, 660 S.E.2d 497 (2008).

[25] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, WC Docket N. 06-55 (March 1, 2007) ("*Time Warner Declaratory Ruling*"), at ¶ 1.

[26] *Id.* at ¶ 8.

[27] *Id.* at ¶ 17.

[28] *See* Applications in Docket Nos. 2008-325-C, 2008-326-C, 2008-327-C, and 2008-328-C.

network (i.e., what is generally known as interconnected VoIP service),[29] as well as intrastate non-voice transmission services consisting of high-capacity, point-to-point, point-to-multipoint and multipoint-to-multipoint dedicated connections between one or more customer locations and/or Time Warner.[30] By Commission Order No. 2009-356(A) dated June 11, 2009, we granted Time Warner's applications. We did not address direct interconnection by Time Warner, but addressed only Time Warner's use of an underlying carrier.[31]

IV. DISCUSSION OF ISSUES

Issue No. 1: Is Time Warner Entitled Under Section 252(i) to Adopt the Sprint ICAs?

(a) Is Time Warner a "Telecommunications Carriers" Entitled to Interconnect Directly with the RLECs?

Time Warner's Position:

Time Warner argues that it is a telephone utility providing telecommunications services as a competitive local exchange carrier under state law, and that it is entitled to interconnection under Section 251 of the Act. Time Warner asserts that, in its certification proceeding, the only condition the Commission placed on Time Warner's ability to interconnect with the RLECs is that the interconnecting carrier must be certificated and regulated by the Commission.[32]

The Petition also states that, in addition to direct interconnection rights for its interconnected VoIP service, Time Warner is independently entitled to interconnection based on its ability to offer wholesale telecommunications services.[33] However, this issue does not appear to be discussed in Time Warner's testimony other than a general statement that Time Warner seeks to provide to itself the same service now being provided to Time Warner by Sprint.[34]

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[29] *See* 47 C.F.R. § 9.3.
[30] *See* Applications in Docket Nos. 2008-325-C through 2008-328-C at ¶ 9.
[31] *See* Order No. 2009-356(A) at 18-19, and at 22, Ordering Clause No. 4.
[32] Revised Petition at p. 9, citing to Order No. 2009-356(A) at p. 19.
[33] Revised petition at p. 9, citing to CRC Declaratory Ruling, para. 26.
[34] *See* Tr. at 57-58.

RLECs' Position:

Under Section 251 of the Act, RLECs are obligated to provide interconnection and services only to requesting telecommunications carriers. RLECs' position is that Time Warner is not a telecommunications carrier as defined in federal law for purposes of its interconnected VoIP service. The Federal Communications Commission ("FCC") has expressly declined to define interconnected VoIP as a telecommunications service for purposes of federal law. Likewise, the Commission found Time Warner's Digital Phone service to be an "interconnected VoIP" service (i.e., a service that has not been classified as telecommunications service for federal purposes). Contrary to Time Warner's assertion that the only condition the Commission placed on its ability to interconnect with the RLECs is that the interconnecting carrier must be certificated and regulated by the Commission, the RLECs point out that the Commission expressly declined to address the issue of whether Time Warner has a right to direct interconnection, required Time Warner to use an underlying carrier, and stated that its Order was intended to be fully consistent with the Time Warner Declaratory Ruling Order.[35]

RLECs also take the position that Time Warner is not entitled to interconnection for the provision of its non-VoIP services. The wholesale service Time Warner claims it will "provide" to itself and possibly to other carriers appears to consist of obtaining interconnection from RLECs for the purpose of providing Time Warner's retail VoIP services and, therefore, does not constitute the provision of services by Time Warner. Furthermore, to the extent Time Warner provides "point-to-point transmission services," those services would flow from point to point

[35] *See* Order No. 2009-356(A) at pp. 18-19 ("Time Warner has represented to this Commission that it has no current plans to interconnect with the RLECs other than through its current wholesale arrangement [with Sprint]. Accordingly, in this Order, we address only Time Warner's interconnection through a wholesaler of its choosing."); *id.* at p. 22, Ordering Clause No. 4 ("[Time Warner] shall only use underlying carriers that are authorized to do business in the State of South Carolina, that hold valid certificates of Public Convenience and Necessity issued by this Commission, and that have interconnection agreements with the RLECs."); *id.* at p. 19 ("We intend this Order to be fully consistent with the FCC's Time Warner Declaratory Ruling ....").

and not over the interconnection arrangement with RLECs and, therefore, cannot be used as the basis for a valid interconnection request.

ORS' Position:

ORS notes that the Commission did not allow direct interconnection in Order No. 2009-356(A), but required Time Warner to use an underlying carrier.[36] However, if the Commission decides to allow Time Warner to interconnect without using an underlying carrier, ORS believes the Commission should afford Time Warner all of the rights and duties afforded telecommunications carriers under the Act.[37]

Discussion:

We have not previously addressed Time Warner's right to directly interconnect with the RLECs. In fact, we expressly declined to address the issue in Order No. 2009-356(A), based on Time Warner's representation in that proceeding that it had no plans to interconnect with the RLECs other than through its arrangement with Sprint.[38] Therefore, Time Warner witness Ms. Laine is incorrect when she implies that we previously granted Time Warner direct interconnection rights on the sole condition that Time Warner was certificated and regulated by this Commission.[39]

Our prior Order addressed only Time Warner's use of an underlying wholesale carrier for interconnection. Time Warner now is suggesting that Time Warner itself may be that underlying wholesale carrier, in essence providing wholesale services to itself. We believe that is a strained interpretation of Order No. 2009-356(A). In fact, not only did our Order contemplate and address the use of an underlying carrier, but we also clearly and expressly intended our Order to

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[36] Tr. at 198, lines 17-21.
[37] Tr. at 199, lines 10-14.
[38] Order No. 2009-356(A) at 18-19.
[39] *See* Tr. at 8, lines 9-12.

be fully consistent with the FCC's *Time Warner Declaratory Ruling*.[40]

In the *Time Warner Declaratory Ruling*, the FCC addressed a petition in which Time Warner Cable asked the FCC to declare that wholesale telecommunications carriers (in that case, MCI WorldCom Network Services, Inc. and Sprint Communications, L.P.) are entitled to interconnect and exchange traffic with incumbent local exchange carriers when providing services to other service providers, including VoIP service providers like Time Warner.[41] The FCC granted the petition, finding that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with ILECs pursuant to Section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services.[42] The FCC further stated:

> In making this clarification, we emphasize that *the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers*, either on a wholesale or retail basis. We do not address or express any opinion on any state commission's evidentiary assessment of the facts before it in an arbitration or other proceeding regarding whether a carrier offers a telecommunications service.[43]

The FCC also emphasized that its ruling was "limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider."[44] Stated another way, the FCC made clear that the scope of its declaratory ruling was "limited to wholesale carriers that are acting as telecommunications carriers for purposes of their interconnection request."[45]

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[40] *See* Order No. 2009-356(A) at 19.
[41] *Time Warner Declaratory Ruling*, ¶ 1.
[42] *Id.*, ¶ 8.
[43] *Id.*, ¶ 14 (emphasis added).
[44] *Id.*, ¶ 16 (emphasis in original).
[45] *Id.*

Contrary to Time Warner's suggestion that the *Time Warner Declaratory Ruling* and *CRC Declaratory Ruling*[46] somehow affirmed an "unequivocal right" of interconnected VoIP providers like Time Warner to interconnect with RLECs,[47] the FCC repeatedly emphasized that it was addressing a specific situation where a wholesale telecommunications carrier sought to exchange a third party carrier's interconnected VoIP service.[48]

Perhaps the clearest language in the order to refute Time Warner's suggestion that the FCC somehow intended to grant direct interconnection rights for retail VoIP providers is as follows: "We also make clear that we do not address any entitlement of a retail service provider to serve end users through such a wholesale arrangement ...."[49]

In fact, the *Time Warner Declaratory Ruling* addressed only an arrangement identical to the one Time Warner and Sprint are already operating under today. The FCC found that telecommunications carriers like Sprint who obtained interconnection *in their own right* as telecommunications carriers and wished to exchange third party VoIP traffic could do so. However, the FCC acknowledged and addressed the legitimate concerns of incumbent LECs, particularly rural LECs, by placing certain conditions on the interconnecting telecommunications carrier. Specifically, the FCC conditioned interconnection rights on the wholesale carrier

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[46] *Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, FCC 11-83, (rel. May 26, 2011) (*CRC Declaratory Ruling*).

[47] *See* Tr. at 46.

[48] In fact, one of the cases cited by Time Warner Cable in its Petition before the FCC was this Commission's decision in Docket No. 2005-67-C regarding MCI's arbitration with Farmers Telephone Cooperative, Home Telephone Company, PBT Telecom, and Hargray Telephone Company. In that docket, we recognized MCI's right to interconnect for its own telecommunications purposes – an issue that the RLECs did not dispute. We did, however, find that MCI could not exchange third party traffic with the RLECs over the interconnection. We noted that non-telecommunications carriers were not entitled to interconnection under Section 251(a) of the Act, and that they should not be allowed to gain indirect interconnection, particularly in a situation where the interconnecting carrier seeks to avoid identification and compensation obligations associated with the third-party traffic. *See* Order No. 2005-544 at 7-8. MCI did not appeal that decision, but it was one of the bases for Time Warner Cable's Petition for a Declaratory Ruling before the FCC. While the FCC granted the Petition, it conditioned those interconnection rights in such a way as to address many of the concerns we and the RLECs voiced with respect to the indirect exchange of third party traffic (*e.g.*., requiring that a regulated telecommunications carrier take responsibility for the appropriate identification and compensation of all traffic).

[49] *Time Warner Declaratory Ruling*, ¶ 15.

assuming responsibility for compensating the incumbent LEC for the termination of all traffic exchanged under the interconnection arrangement, and on the customer being able to port a number back from a VoIP provider.[50] The FCC also noted that nothing in its order diminished the ongoing obligations of wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by the FCC or a state commission.[51]

To the extent Time Warner is suggesting that the *CRC Declaratory Ruling* somehow expanded upon the *Time Warner Declaratory Ruling*, this argument is also without merit. The arrangement at issue in both cases was the same – i.e., a proposed interconnection arrangement between a wholesale telecommunications carrier "in the middle" and an incumbent LEC, and the proposed exchange of interconnected VoIP traffic through that interconnection. The case did not involve or address direct interconnection by an interconnected VoIP provider, but instead addressed the exact same type of arrangement by which Time Warner is currently exchanging traffic with the RLECs through Sprint.

In the *CRC Declaratory Ruling* matter, the incumbent LEC argued that it did not have an obligation to interconnect with the wholesale telecommunications carrier at all, despite the *Time Warner Declaratory Ruling*, because, as a rural telephone company, the incumbent LEC was exempt from the interconnection obligations of Section 251(c) of the Act. The FCC held that the rural carrier must still interconnect with the wholesale telecommunications carrier (i.e., the carrier in the middle) under Section 251(a) and (b) of the Act. In other words, the FCC reaffirmed the *Time Warner Declaratory Ruling*, with the clarification that it also applied to rural telephone companies that hold rural exemptions. In the case before us today, the RLECs are already interconnected with Sprint pursuant to Section 251(a) of the Act, and have never argued they are not obligated to do so. Thus, the *CRC Declaratory Ruling* is not applicable here.

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[50] *Time Warner Declaratory Ruling*, ¶¶16, 17.
[51] *Time Warner Declaratory Ruling*, ¶ 16.

Nor do the other cases cited by Time Warner affirmatively grant direct interconnection rights for retail VoIP providers, as Time Warner argues.[52] As RLEC witness Mr. Meredith states in his testimony, none of the cases deal with Section 251 interconnection.[53] In fact, one of the cases cited by Time Warner even holds that it would not necessarily be considered arbitrary if the FCC were to conclude that carriers were telecommunications carriers for purposes of one section of the Act and not for purposes of another.[54]

Similarly, notwithstanding ORS' concern,[55] it is perfectly logical to find that Time Warner is a provider of telecommunications service as defined in state law[56] for state purposes, but that it is not a provider of telecommunications service, and therefore not a telecommunications carrier, as defined in federal law for federal purposes.[57] The state and federal definitions, as well as the regulatory regimes, are different.[58]

Interestingly, while Time Warner argues that retail VoIP providers have an "unequivocal right"[59] to direct interconnection with incumbent LECs, and that this is "the normal practice,"[60] Time Warner's witness admitted that this is a new issue for them, in that Wisconsin and South Carolina are the only two states where Time Warner offers its VoIP service as a regulated

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[52] Ms. Laine testified that "the FCC has unequivocally held that a state certificate of public convenience and necessity and a filing of a state tariff with a commission to demonstrate [sic] that a party is a telecommunications carrier, not just under state law but also under federal law, the federal Telecommunications Act." Tr. at 50-51.

[53] CITE to DM testimony, distinguishing *IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 ¶ 38, n. 128 (2005) (which dealt with access to E911 networks); *Fiber Technologies Network, LLC v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 3392, 3399 ¶ 20 (2007) (which dealt with pole attachment rights); and *Bright House Networks, LLC v. Verizon California Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 10704 ¶ 39 (2008), *aff'd, Verizon California Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009) (which dealt with CPNI obligations).

[54] *See Verizon California Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009).

[55] See Tr. at 193, lines 7-23.

[56] *See* S.C. Code Ann. § 58-9-10(15).

[57] *See* 47 U.S.C. § 153(46); 47 U.S.C. § 153(44).

[58] *See* Tr. at 103-104.

[59] Tr. at 46, line 3.

[60] Tr. at 71, lines 21-25.

service.[61]

We understand that Time Warner wants the flexibility to change its business partners, and we agree that it is appropriate for Time Warner to have that flexibility. We have not required and we are not requiring Time Warner to continue using Sprint. We are merely requiring Time Warner to continue using a wholesale telecommunications carrier, as defined in federal law for purposes of Section 251 of the Act, for interconnection. This is the same position we took in prior dockets, and is fully consistent with the *Time Warner Declaratory Ruling* and the *CRC Declaratory Ruling*. The effect of these FCC rulings and our certification order was not to prevent Time Warner from doing business, but to grant its request for certification and to provide an avenue for Time Warner to obtain interconnection with RLECs despite the unclassified nature of Time Warner's retail VoIP service. In fact, as RLEC witness Mr. Meredith pointed out, Time Warner has several options for continuing to offer its Digital Phone service in South Carolina, to include using Sprint, using any other underlying carrier that meets the conditions of Order No. 2009-356(A), and entering into a commercial arrangement with the RLECs for interconnected VoIP services outside the parameters of a Section 251 interconnection agreement.[62]

As far as Time Warner's right to interconnect based on its ability to offer wholesale services, we fail to see how that is any different from the argument we rejected in 2004 that stepping into Sprint's shoes to obtain interconnection from RLECs and "provide" that interconnection to itself constitutes the provision of telecommunications service by Time Warner. As noted above, Time Warner did not provide testimony in support of its position. Nothing has changed, and we have no basis upon which to find that Time Warner's "ability to offer" wholesale services in the form of interconnecting with the RLECs is sufficient to justify the interconnection in the first place.

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[61] See Tr. at 74, lines 11-14.
[62] Tr. at 130.

We agree with RLECs that, while we have found Time Warner's interconnected VoIP to be a telecommunications carrier for state purposes, it is not a telecommunications service as defined in federal law for purposes of Section 251 interconnection. Nonetheless, as discussed above, both the FCC and this Commission have provided Time Warner with a vehicle by which to exchange its interconnected VoIP service with RLECs; Time Warner is currently providing Digital Phone service in RLEC areas; and Time Warner has a number of options for continuing to provide Digital Phone service in RLEC areas. Granting direct interconnection would harm RLECs because it would create uncertainty in the regulatory process.[63] This was clearly demonstrated when Ms. Laine was asked to comment on the difficulties that would be involved if Time Warner decided to "go back" to being an information service provider.[64] Ms. Laine responded:

> If the FCC were to determine that VoIP services are information services, we would be – *we are in full agreement that information service providers are not entitled to interconnection.* We would not disagree with that and are not trying to obtain rights that are not bestowed upon us by the law. ... So if the FCC were to rule VoIP to be an information service, *we would either have to choose not to be regulated and, therefore, not to be able to get interconnection*, or we would continue to be regulated and we would be, under those circumstances, entitled to get the rights associated with those obligations. ... *[W]e could choose to take advantage of the deregulation, but at that point if we were to go that way, we would not be entitled to the rights given to telecommunications carriers.*[65]

This testimony by Ms. Laine illustrates what the RLECs have said they are concerned about.[66] Time Warner is seeking interconnection rights today, in this arbitration, while at the same time stating that, if the FCC classifies interconnected VoIP as an information service in the future, Time Warner could choose at that time not to be regulated as a telecommunications carrier. Time Warner acknowledges that, in that event, it would not be entitled to the rights given to

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[63] *See* Tr. at 115.
[64] Tr. at 75, lines 3-7.
[65] Tr. at 75, line 22 to 77, line 19.
[66] *See, e.g.*, Tr. at 115, 129.

telecommunications carriers, including interconnection. However, as RLEC witness Mr. Meredith pointed out, Time Warner would already be interconnected and "you can't unring the bell."[67]

Issue No. 2: If Time Warner is a Telecommunications Carrier Entitled to Direct Interconnection with RLECs, May Time Warner Adopt Interconnection Agreements Whose Initial Terms Have Expired?

Time Warner's Position:

Time Warner alleges this is not the "real issue" in dispute between the parties.[68] Time Warner argues that extending the Sprint ICA to Time Warner is technically feasible and would not exceed the costs of providing the services to Sprint.[69] Time Warner points out that, while the initial terms of each of the Sprint ICAs have concluded, each of the ICAs remains valid and operational and will continue in full force unless terminated pursuant to the terms of the agreements. Time Warner argues that the Commission should interpret "a reasonable period of time" broadly enough to encompass any existing valid ICAs.[70] Laine Rebuttal at p. 5.

RLECs' Position:

RLECs take the position that, even if the Commission were to determine that Time Warner is entitled to direct interconnection, it would not be appropriate to allow Time Warner to opt into agreements whose initial terms have expired. The agreements in question each had an initial two-year term, with the most recent agreement expiring in June 2010, well over a year ago.

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[67] Tr. at 129, lines 18-23; Tr. at 153, line 25 to 154, line 6.
[68] Revised Petition at 7.
[69] *See* Tr. at 56, lines 16-18.
[70] Tr. at 57, lines 16-18.

ORS' Position:

ORS agrees with RLECs' position that interconnection agreements should be available for opt-in only during the initial term.[71]

Discussion:

Section 252(i) of the Act provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[72]

The FCC has promulgated a rule limiting carriers' ability to opt into existing interconnection agreements as follows:

> Individual agreements shall remain available for use by telecommunications carriers pursuant to this section *for a reasonable period of time after the approved agreement is available for public inspection* under section 252(h) of the Act.[73]

Thus the FCC has clearly stated that just because an agreement is still valid does not necessarily mean it is available for adoption. In promulgating this rule, the FCC stated:

> We agree with those commenters who suggest that agreements remain available for use by requesting carriers for a reasonable amount of time. Such a rule addresses incumbent LEC concerns over technical incompatibility, while at the same time providing requesting carriers with a reasonable time during which they may benefit from previously negotiated agreements. In addition, this approach makes economic sense, since the pricing and network configuration choices are likely to change over time, as several commenters have observed. Given this reality, it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.[74]

The determination of what constitutes a reasonable period of time to allow carriers to opt

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[71] Tr. at 213, lines 1-16; Tr. at 214, lines 9-16.
[72] 47 U.S.C. § 252(i).
[73] 47 C.F.R. 51.809(c) (emphasis added).
[74] Local Competition Order at ¶ 1319. (Note that the pick and choose opt-in procedures have changed and are not at issue in this proceeding.)

into existing interconnection agreements is an issue for the state commission to decide.[75] We have previously addressed the question of what constitutes a "reasonable period of time" for which an agreement must be made available for opt in, although in a different, hypothetical context.[76] In that arbitration matter, ALLTEL was not seeking to opt into an agreement, but was negotiating its own agreement with BellSouth. BellSouth wanted to include language in their interconnection agreement that would prohibit ALLTEL from adopting a different interconnection agreement if the agreement had less than 6 months to run before it expired.[77] We declined to require such language in an interconnection agreement in a hypothetical context. In doing so, we stated: "While the Commission recognizes that there should be some limit on the length of time to opt into an interconnection agreement, the Commission further recognizes that a six-month time period may not be reasonable in all circumstances. … A reasonable opt-in time will depend upon the circumstances of a particular case."[78]

Here, we are asked to consider whether allowing Time Warner to opt into the Sprint ICA is reasonable under the specific circumstances, which include the fact that there is no time left before expiration of the agreement. The original terms of each of the agreements expired well over a year ago. It is true, as Time Warner points out, that the agreement is still in effect, continuing on a year-to-year basis under an automatic renewal or "evergreen" provision. However, such provisions are common in interconnection agreements and are intended to protect the competitive carrier and its customers from the sudden expiration of an interconnection

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[75] *See* Tr. at 9, lines 3-9, *citing Global NAPs, Inc. v. Verizon New England, Inc.*, 34 CR 1390 (1st Cir. 2005) ("The FCC has not interpreted the statute on the precise question before us. That is not surprising, since the issue is one of the power of a state commission."); *see also In re Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief*, Case No. 8731, (Md. PSC July 15, 1999) at 3 and 5 (wherein the Maryland Commission determined that opting into a three year interconnection agreement after two and a half years had elapsed was not reasonable).

[76] *See Petition of ALLTEL Communications, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 Respecting an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Order on Arbitration, SCPSC Order On. 2001-328, dated April 16, 2001, in Docket No. 2001-31-C.

[77] *Id.*, Issue No. 13(a).

[78] *Id.* at p. 24.

agreement and interruption of services. They should not be interpreted as evidence of the RLEC's intent to have the agreement remain in place and available for other carriers to opt into for longer than the original term. Furthermore, Time Warner's position that carriers may opt into any valid agreement at any time is not consistent with the FCC's rule. If any valid agreement could be adopted, it would be completely unnecessary for the FCC to state that agreements are only available for opt in "for a reasonable period of time after the approved agreement is available for public inspection," and the FCC rule would be meaningless.[79]

We believe it is reasonable to allow adoption of an agreement only during its initial term and not during an evergreen term. During the extended evergreen term of the Sprint ICA, for example, either party may request renegotiation of the agreement between 180 and 120 days prior to the expiration of the current term. If negotiations extend beyond the term and neither party files for arbitration, the agreement converts to a month-to-month agreement and either party may terminate the agreement on thirty days' notice.[80] The length of the initial term is known to adopting carriers, but the length of the evergreen term is not.

In light of our finding that Time Warner is not a telecommunications carrier for purposes of federal Section 251 interconnection rights, it is not necessary for us to reach the issue of whether Time Warner may opt into the Sprint ICA. However, because we have been asked to determine the issue in this arbitration and for the reasons stated herein, we find that the Sprint ICAs are not available for opt in. We find that a "reasonable time" for which an interconnection agreement is available for adoption should, at a minimum, not extend beyond the initial term of the agreement. The initial term of the agreement is a reasonable time during which interested carriers may benefit from previously negotiated agreements. At the same time, allowing carriers to opt into agreements only during the initial term prevents new carriers from imposing outdated

[79] *See* Tr. at 129, lines 4-8; Tr. at 163, lines 5-10.
[80] *See* Sprint ICA, Paragraph 2.1 (attached as Exhibit 1 to Initial Petitions for Arbitration).

agreements or terms upon an incumbent LEC.

V. CONCLUSION

For the reasons stated herein, we find that Time Warner may not adopt the Sprint ICA because Time Warner is not a "telecommunications carrier" for purposes of interconnection under Section 251 of the federal Act. Furthermore, even if Time Warner were a telecommunications carrier entitled to interconnection with RLECs, the Sprint ICA is not available for adoption because its initial term has expired.

This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

_____

John E. "Butch" Howard, Chairman

ATTEST:

_____

David A. Wright, Vice Chairman

(SEAL)

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

Docket Nos. 2011-243-C, 2011-244-C, 2011-245-C, and 2011-246-C

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Farmers Telephone Cooperative, Inc. (Docket No. 2011-243-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Fort Mill Telephone Company (Docket No. 2011-244-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and Home Telephone Company, Inc. (Docket No. 2011-245-C)

IN RE: Petition for Arbitration of Interconnection Agreement between Time Warner Cable Information Services (South Carolina), LLC, doing business as Time Warner Cable and PBT Telecom, Inc. (Docket No. 2011-246-C)

CERTIFICATE OF SERVICE

I, Rebecca W. Martin, do hereby certify that I have this date served one (1) copy of the attached Proposed Order to the following parties causing said copies to be deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto, and addressed as follows.

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October 5, 2011

Columbia, South Carolina